IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
February 26, 2008 Session

STATE OF TENNESSEE v. JASON LEBRON ROGERS

Direct Appeal from the Criminal Court for Hamilton County
No. 248056 Jon Kerry Blackwood, Senior Judge

No. E2007-00354-CCA-R3-CD - Filed June 4, 2008

A Hamilton County jury found the Defendant, Jason Lebron Rogers, guilty of facilitation to commit first degree felony murder and especially aggravated robbery. The trial court sentenced him to twenty-three years for the facilitation conviction and twenty-four years for the especially aggravated robbery conviction and ordered the sentences to run concurrently. On appeal, the Defendant contends: (1) the trial court did not properly rule on his motion for a directed verdict; (2) the evidence is insufficient to sustain his conviction of facilitation to commit first degree felony murder; (3) the trial court should have declared a mistrial based upon a biased juror; (4) the trial court committed several evidentiary errors; (5) the State's closing argument constituted prosecutorial misconduct; and (6) the trial court erred in sentencing the Defendant when it applied two enhancement factors. We affirm the Defendant's convictions. With regard to sentencing, we conclude that, pursuant to *Blakely v. Washington*, 542 U.S. 296 (2004), the trial court erred when it applied two enhancement factors. We, therefore, reduce the Defendant's sentences from twenty-four and twenty-three years respectively to twenty-one years, and we remand to the trial court for entry of amended judgments reflecting the modified sentences.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed in Part Reversed in Part and Remanded

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JERRY L. SMITH and ALAN E. GLENN, JJ., joined.

Robin Ruben Flores, Chattanooga, Tennessee, for the Appellant, Jason Lebron Rogers.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Leslie E. Price, Assistant Attorney General; William H. Cox, III, District Attorney General; M. Neal Pinkston and Rachel L. Winfrey, Assistant District Attorneys General, for the Appellee, State of Tennessee.

OPINION

I. Facts

A Hamilton County Grand Jury indicted the Defendant on charges of first degree premeditated murder, first degree felony murder, and especially aggravated robbery, related to the beating death of James Neff on October 24, 2003. His co-defendant, Paul Justin Newsome, was indicted on the same charges but, before trial, pled guilty to second degree murder and especially aggravated robbery. At the Defendant's trial, the following evidence was presented: Jimmy Bowen testified through an interpreter that he had known Neff, his neighbor, for six years before Neff's death. On October 24, 2003, Bowen looked out his front window and saw a truck parked at Neff's house. At around 12:00 p.m. the truck was gone, and, by 1:00 p.m., a different truck, which was red, was parked near the house. Bowen left to get some food around 4:00 p.m., and, upon his return, he saw "feet" that looked out of place. Bowen walked to the victim's driveway, and he found the victim lying partially on the steps to the victim's house and partially on the ground near the steps. The victim was hurt badly but still breathing. Bowen enlisted the aid of other neighbors to call 9-1-1.

Terry McGhee, who lived next door to the victim, testified that on October 24, 2003, he heard a knock at his door. It took him a few minutes to answer the door, but, when he did, he saw Bowen waving for him to come towards Neff's house. McGhee recalled that another neighbor, Morris, was also at Neff's house, and they were standing next to Neff's body. McGhee saw blood on Neff's head and on the sidewalk where he was lying. McGhee called 9-1-1, and, within three to five minutes, law enforcement and an ambulance arrived. On cross-examination, McGhee agreed that different cars frequently parked at the victim's house. He said he knew the victim had previously been in a serious car accident, but he did not know whether he had multiple types of prescription pills as a result. McGhee testified he did not know the Defendant.

Lois Ann Burns testified that the victim had been her "best friend" for about a year to a year and a half before he was killed. On October 24, 2003, she waited at her apartment for the victim to come by after his doctor's appointment, but he never arrived. A man by the name of Paul Newsome did, however, come by her apartment. She knew Newsome through her son, and Newsome had stayed in her apartment with her for two or three months. She had not seen him in six or seven months before this incident because he had been in jail. When Newsome arrived on the 24th, he brought the Defendant, and Burns thought she had seen the Defendant on one prior occasion.

Burns testified that, when the two men arrived, they told her that they were waiting for the victim to get home because he was going to sell them half of his morphine pills. Her cousin was present at the apartment and had a morphine pill with her. The men asked Burns' cousin if they could get the pill from her, and she agreed. The men told her that they would repay her with a pill when they purchased the pills from the Defendant. The men then "cooked" the pill in a spoon, placed it in a needle, and shot it into their arms. The men stayed approximately thirty more minutes and then left to meet the victim at his house. Burns said that she was talking to the victim on the phone when the men arrived at his house, and he said, "I've got to go, they're

here." Burns tried to call the victim about fifteen to thirty minutes later, but he did not answer, which was unusual.

Burns said that the two men never returned to repay her cousin the morphine pills, but she did not expect them to do so. Burns testified she had taken morphine herself that same morning, but she did not do so with Newsome and the Defendant. Burns recalled that she had previously seen Newsome drive a "little red truck."

On cross-examination, Burns admitted that she illegally purchased and received morphine pills and that she was addicted to morphine. She said, however, she was currently getting help for her addiction. Burns agreed she was not completely honest with the police when she first spoke with them on the night of the victim's death. She told the police that Newsome and the Defendant left her house for the victim's house, but she did not tell them that Newsome and the Defendant were planning to buy morphine pills. She explained that, at the time, she did not know whether the victim was alive and did not want to get him into trouble. When she learned of the victim's death, she told the police the entire story.

Timothy Mullinax, a captain with East Ridge Police Department, testified that he assisted in this investigation. When the captain arrived at the scene, he saw the victim being loaded into the ambulance. He noted that the victim was bleeding "profusely" from his head area. Captain Mullinax learned that the victim had been found in his own front yard. Someone at the scene approached the captain and informed him that his brother had information about this crime. As a result, Captain Mullinax spoke with James Brumlow, who suggested he speak with Burns. The captain interviewed Burns and got Newsome's name. After some investigation, Newsome contacted the captain and agreed to come to the police station with the Defendant. Captain Mullinax testified he later executed a search warrant at Newsome's house, and he learned that Newsome and the Defendant lived across the street from each other. On cross-examination, Captain Mullinax testified that he was not present when the Defendant gave a statement, and he did not collect any evidence at the victim's home.

Dr. Frank King testified that he performed the autopsy of the victim's body, during which he noted evidence of blunt trauma, including numerous abrasions, contusions, and lacerations. The victim also suffered numerous bone fractures including the following: a fracture to the nose, fractures to fourteen ribs, and multiple fractures to the skull. The victim's spleen had been torn, causing a large hemorrhage into his abdominal cavity. The doctor described the injuries, and photographs of the injuries, in detail. He agreed that most of the injuries were consistent with a standard size aluminum baseball bat. Dr. King performed a toxicology report on the victim's blood, and the victim tested negative for alcohol and for all drugs except morphine. There was a "fairly high amount" of morphine in the victim's bloodstream, and there was some evidence that the victim was an intravenous drug user. On cross-examination, Dr. King testified that the high amount of morphine in the victim's blood would have made him less susceptible to pain.

Julius Johnson, a detective with the East Ridge Police Department, testified that he investigated this case beginning October 24, 2003. When he first arrived at the crime scene, he met with the other officers to gather initial information. He then identified different pieces of

evidence in the front yard, including a broken vase, some loose change, the victim's keys, a small butane fuel canister, bloody shoe prints, and drops of blood. The detective entered the house, where he found blood evidence in the living room, kitchen, and den. Detective Johnson testified that, at the victim's house, a white Ford Ranger pickup truck was parked and it was registered to the victim's mother. In the truck, he found white prescription sacks with prescriptions for morphine and Effexor XR both dated "10/24/03." The receipt found with the bag showed that the victim had purchased 120 morphine pills. The detective testified he was unable to find the pill bottle containing the morphine pills or the Effexor pills at the victim's house.

The detective testified that he collected blood samples from the living room, the kitchen, the TV room, the bathroom, and the victim's bedroom. He also dusted the crime scene for latent fingerprints. He obtained a number of prints that he sent to the Tennessee Bureau of Investigation ("TBI") crime laboratory. The Defendant's fingerprints were not found at the scene, but the fingerprints of Newsome and a woman named Charlene Ruth Daugherty were both found. Through his investigation, Detective Johnson learned Daugherty had not been at the victim's house on October 24, 2003, but she had been there on a previous occasion. In the kitchen of the home, the detective found a large, wood-handled broom that had a portion broken from it and appeared to be bloody. He collected these and sent them to TBI for testing. Additionally, the detective collected a bloody baseball cap and piece of an overturned and broken kitchen chair that also appeared to have blood on it. The detective took a video of the crime scene, which he described as it was played for the jury.

Detective Johnson obtained a search warrant for the blood of the Defendant and Newsome, which he forwarded along with a sample of the victim's blood to the TBI for comparison with the blood found at the crime scene. The detective testified he monitored the Defendant's and Newsome's interviews, which were conducted by Detective Robert Starnes with the Hamilton County Sheriff's Department. After the interview, the detective took photographs of the Defendant to show his clothing and appearance. He also took photographs of his hands, which did not show any lacerations or injuries. He also looked for, but did not find, injuries on Newsome.

Detective Johnson testified he searched the houses of both Newsome and the Defendant. In Newsome's house, he found and confiscated a pair of tennis shoes, a pair of blue jeans, a pair of shorts, a shirt, a ball bat, and a T-shirt that he found in a garbage can in the kitchen. The baseball bat was metal, 33 inches long, black and silver, and had the word "Easton" on it, and the detective found the bat in Newsome's closet. After a subsequent interview with the Defendant, the detective searched his home again looking for clothing that may have been burned in a fire pit. In the fire pit, he found part of a belt buckle, scraps of fabric, some buttons from Levi products, and rivets similar to those found on a pair of jeans.

On cross-examination, Detective Johnson agreed that he did not know where the victim went between the time that he filled his prescription at the pharmacy and when he arrived home. He agreed that he did not investigate further whether Daughtery was at the victim's house after she denied being there on the day of the murder. The officer agreed that, when applying for the

search warrant, he swore that Newsome agreed that he had hit the victim numerous times in the head with a baseball bat.

Bradley Everett, with the TBI crime laboratory, testified that he tested all of the objects submitted by Detective Johnson for the presence of blood and then for DNA. He found the victim's blood on the baseball bat found in Newsome's house. Agent Everett also found the victim's blood on the push broom found in the victim's house, in addition to multiple other items in the house. On the Defendant's blue jeans, the agent found the blood of two people, one of whom was the Defendant. The agent said that there was not enough "information" for him to determine who was the other source of blood on the Defendant's jeans. On cross-examination, Agent Everett testified he found blood from an "unidentified female" on a coffee table from the victim's home.

Detective Robert Starnes, with the Hamilton County Sheriff's Office, testified that he interviewed the Defendant on October 27, 2003, after giving him *Miranda* warnings. A videotape of that interview was played for the jury. During that interview the Defendant said he had recently become friends with Paul Newsome, who lived across the street from him. On Friday October 24, 2003, Newsome asked him to go to East Ridge to meet someone and pick up morphine pills. The two rode together in Newsome's red Nissan pickup truck to a CVS pharmacy, where they parked at the side of the building and waited for a man whom Rogers did not know. Rogers planned to get one morphine pill. After five to ten minutes the man had not arrived, and the Defendant said he and Newsome left and went to the apartment of "some woman," whose name he did not know. There, they got a thirty milligram morphine pill. The Defendant said that they left the apartment after about ten or fifteen minutes and went straight home. He later revealed that he, in fact, knew the name of the woman who lived in the apartment, calling her "Ann" (referring to Lois Ann Burns).

The Defendant initially denied he and Newsome went anywhere other than CVS and Burns' apartment. After a break and further questioning, the Defendant said that he wanted to tell the whole truth but said he was scared for his family's safety because he thought Newsome's family may kill them if he told the truth. The Defendant then said that he and Newsome went to a man's house after they were at Burns' apartment. There, Newsome went inside the house for ten or fifteen minutes while the Defendant waited in the car. The Defendant did not hear anything because the radio in the truck was playing.

The Defendant then said that he got out of the truck but never went into the house. While out of the truck, he saw a man "fall" out of the front door of the house where Newsome had entered. The man fell onto the front porch and landed face up. The man was bleeding from his head and had blood all over his face. The Defendant noted that the man was still breathing. He was scared and got back into the truck. Newsome, who had some blood on his face, also got into the truck. Newsome told the Defendant that the man had tried to steal Newsome's money, so Newsome beat him up. The Defendant did not know whether Newsome had taken anything from the house, but Newsome did not give anything, including any morphine pills, to the Defendant. The Defendant said he did not know who the man was, but he expressed remorse for the pain suffered by him and by his family.

Detective Starnes testified that the last thing that the Defendant did was draw a picture of the victim's home. On that picture he indicated where Newsome parked his truck during the attack, the location of the victim's body, and where Newsome was during this attack. He also described the position of the victim's body, which led the detective to believe that the Defendant had actually been at this crime scene.

In a subsequent interview, which began at 12:12 a.m. on October 28, 2003, and was also videotaped and played for the jury, the Defendant admitted that he had, in fact, entered the house. He said that, when he did so, he saw the victim and Newsome fighting over a baseball bat. The victim was bleeding, but appeared to have the upper hand. The Defendant said he pushed the victim off of Newsome. Newsome, who obtained the bat, swung the bat, hitting the victim in the arm. Newsome then hit the victim with the bat again when the two were closer to the front door and hit him another time when the two were outside. The Defendant said he never hit the man.

After these interviews, the detective made a decision with the other officers to charge both the Defendant and Newsome with this crime. Some time later, the Defendant's attorney contacted Detective Starnes and asked him to interview the Defendant again, and the detective complied. During that interview, which was videotaped and played for the jury, the following occurred: The Defendant went through substantially the same story again but added a few important details. He said that, on the morning of this crime, Newsome told him that he knew of someone who sold morphine and that Newsome planned to go steal some pills. The plan was for Newsome to go inside, take the pills, and come back. The Defendant said that he was to be the "lookout" and to sit in the car and ensure that no one attacked Newsome when Newsome was on his way back out.

The Defendant said that he and Newsome went by the victim's house, but the victim was not there. They then went to Burns' house, where Newsome called the victim and learned that the victim was on his way home from filling his prescription. Newsome and the victim agreed to meet at the victim's house. They drove by the victim's house, and he was home. The Defendant said Newsome backed into the driveway, told the Defendant to wait in the car, and took the baseball bat with him to the front door. Newsome brought money with him and left the bat outside the door because he was planning to simply purchase, and not steal, the pills if there was anyone else besides the victim present in the house.

The Defendant said that Newsome then came out of the house and yelled for the Defendant to come in the house. Newsome took the baseball bat with him into the house. The Defendant said that, by the time he got inside, there was blood inside the house, but the Defendant did not know to whom it belonged. The Defendant pushed the victim off of Newsome, and Newsome hit the victim with the bat. Newsome and the victim went out the front door, after which the Defendant heard a loud "ping." The Defendant exited the front door and saw the victim lying on the porch. Newsome went through the victim's pockets, saying that he was looking for drugs. The Defendant reiterated that the victim was breathing when they left.

Newsome, however, told him that the victim was "dead," and if he was not dead yet he would die soon.

The two got into the truck and drove back to Newsome's father's house. Newsome told the Defendant to take off his clothes, and Newsome took off his own clothes. The Defendant recalled that Newsome told Newsome's family, "I killed him, I killed him." Newsome told his younger brother to take their clothes outside and burn them. The Defendant also speculated that the baseball bat had been cleaned with gasoline.

The Defendant denied receiving any medication as a result of this incident. He also denied ever hitting the victim with a broom. He agreed he picked up the broom but explained he did so only because he thought that the victim was going to come after him. He then threw the broom back on the floor, where Newsome and the victim fell on it during the fight.

On cross-examination, Detective Starnes testified that the Defendant maintained in the interview that he feared for himself, but the detective was unsure whether that fear was genuine. The detective agreed that the Defendant told him that the Defendant's child spent time at the Defendant's house, which was near Newsome's. Detective Starnes agreed that the Defendant requested that his jail cell be moved away from Newsome's jail cell.

The parties stipulated to the report of the latent fingerprint examiner. That report showed that two of the fingerprints found were identified: one fingerprint belonged to Newsome and the other belonged to Ruth Daugherty.

The Defendant called his brother, Danny Lee Rogers, to testify. Rogers testified he saw his brother before and after this incident. After this incident, the Defendant was with Newsome, and the two were pulling into the driveway across the street in the little red Nissan pickup truck that Newsome drove. Rogers noted that some of their behavior was odd, so he went over to the house. He saw the Defendant there, and the Defendant looked pale and "real[ly] nervous." Newsome came from the back room and was putting on different clothing and carrying a pill bottle. Newsome sent his brother to the car to retrieve a baseball bat and then to the backyard to burn some clothes.

Lieutenant Gene Coppinger with the Hamilton County Sheriff's Office testified that his job involves the security and safety for the inmates housed at the jail. He presented evidence showing that the Defendant and Newsome were originally housed together for booking. The same day, they were transferred to different areas in the jail and were never together in the same cell again.

Grace Rogers, the Defendant's grandmother, testified that she raised the Defendant. She said that she saw him on the night of this incident, and he was crying and stumbling and did not look coherent. The Defendant hugged her and spoke to her with slurred speech. On cross-examination, Rogers testified that she did not recall what month this incident occurred.

Calvin Rogers, the Defendant's grandfather, testified by deposition. This testimony is not included in the record on appeal.

The Defendant testified that he had used drugs for approximately two years before this incident. He said that he took morphine and Oxycontin intravenously, and he also drank "every now and then." The Defendant said that he went to the victim's house to get drugs for himself and his father from the victim, who had previously sold drugs to the Defendant's father. He contacted Newsome to help him get the drugs, and Newsome said he had a plan to take the victim's drugs. The Defendant was simply to wait in the car while Newsome went into the house. The Defendant said that he was confused by the plan because he had $100 to purchase the drugs, but he went along with Newsome anyway.

When the two went to East Ridge together, they first stopped at a gas station for gas. They then went to the victim's house to see if he was home. He was not, so they went to Burns' apartment. They told her that they were trying to get in touch with the victim, but Newsome and Burns did most of the talking. Newsome called the Defendant into the kitchen of Burns' apartment and offered the Defendant some of a morphine pill that he had. The Defendant and Newsome shared the morphine pill, injecting it.

The Defendant said that he and Newsome left and went to a house in East Ridge that was located behind a school. Newsome backed the truck into the driveway and asked the Defendant for the $100. The Defendant gave it to him and then sat in the car for a few minutes. Newsome called for the Defendant to get out of the car, and, when the Defendant did so, he heard "a lot of commotion." He entered the house and could hear more noise coming from the kitchen. In the kitchen, he saw the victim with a baseball bat pressing the bat to Newsome's throat choking him. The Defendant said it looked like Newsome could not breathe well, so he ran and tried to knock the victim off of Newsome. The victim came towards the Defendant, who ran to the other side of the kitchen to avoid being hit with the bat.

The Defendant said that he picked up the broom and hit the victim with the handle once. The blow did nothing to the victim, who was still struggling with Newsome over the bat. The Defendant swung the broom again and hit the victim in the neck. The victim turned around to grab the Defendant, and Newsome was able to get the bat away from the victim. Newsome then hit the victim with the bat, and the victim fought back with Newsome. The Defendant recalled that Newsome was trying to back out of the kitchen, but the victim persisted. The Defendant said he tried to get out of the way because he did not want to be hit with the bat. Newsome kept hitting the victim with the bat as Newsome and the victim headed towards the door. The victim went outside of the house and seemed to trip and fall on the sidewalk. The Defendant remained inside the house while the other two men were outside the house.

The Defendant said that he next heard a "loud ping," and he went outside to see the victim lying motionless, still breathing, on the ground. The Defendant saw Newsome going through the victim's pockets, and the Defendant ran to the truck because he was afraid. Newsome threw the bat into the truck and then drove them to Newsome's father's house in Decatur. Once they arrived in Decatur, his father told them to take their clothes off, and

Newsome's twelve-year-old brother burned the clothes outside. Newsome gave the Defendant new clothes to wear. The Defendant recalled that Newsome then sat on the couch and pulled a pill bottle out of his pocket. The Defendant said that he felt nervous and paced back and forth in the kitchen. He left the house and went to his father's house, where he saw Newsome give his father some of the medication.

The Defendant said that he went to the police station to tell the police a lie that would help Newsome. He did so because he was afraid of Newsome and Newsome's family, who had previously threatened him.

On cross-examination, the Defendant testified that he was supposed to wait in the truck while Newsome went inside to take the pills. He was also supposed to make sure that no one "tackled" Newsome as Newsome returned to the truck. The Defendant first saw the baseball bat during the altercation. The Defendant saw Newsome hit the victim once in the ribs and once or twice in the head. The Defendant agreed that Newsome gave him twenty morphine pills.[1]

Based upon this evidence, the jury convicted the Defendant of facilitation to commit first degree felony murder and especially aggravated robbery.

II. Analysis

On appeal, the Defendant contends: (1) the trial court did not properly rule on his motion for a directed verdict; (2) the evidence is insufficient to sustain his conviction of facilitation to commit first degree felony murder; (3) the trial court should have declared a mistrial based upon a biased juror; (4) the trial court committed several evidentiary errors; (5) the State's closing argument constituted prosecutorial misconduct; and (6) the trial court erred in sentencing the Defendant when it applied two enhancement factors.

A. Motion for Directed Verdict

The Defendant contends that the trial court erred when it denied his motion for directed verdict by not providing any reasons for the denial. He states that this did not give him proper notice of its reasons for the denial, placing him in a position where he had to "take his chances with the Court of Appeals and the jury or waive this issue and proceed with his case-in-chief." This, he asserts, was a denial of procedural and substantive due process.

Tennessee Rule of Criminal Procedure 29(a) provides:

> Motion Before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on

[1]We note that, included in the record, is a videotaped interview with Newsome. Newsome was called at trial to testify but invoked his rights pursuant to the Fifth Amendment. While in the record, the videotape appears not to have been played for the jury.

> motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the State is not granted, the defendant may offer evidence without having reserved the right.

The Defendant concedes that the trial court denied his motion for judgment of acquittal. He asserts, however, that it should have provided reasons for so doing. We find no authority, and the Defendant has cited none, that requires the trial court to articulate these reasons in the record. We cannot agree that the trial court's failure to articulate its reasoning violates the Defendant's due process rights. Clearly, the trial court found that the evidence presented was sufficient to support the offenses charged in the indictment. This finding apprised the Defendant of the information necessary for him to proceed with his defense.

Furthermore, the Defendant has waived our review of this issue by not standing on his motion but rather proceeding with his case-in-chief. In *Mathis v. State*, 590 S.W.2d 449 (Tenn. 1979), the Tennessee Supreme Court held that when a trial court:

> [O]verrules, or does not act, upon a motion for an acquittal made at the conclusion of the State's proof, if counsel is convinced as to the validity of the motion, he or she must then and there take affirmative action to confine the controversy to the proof already presented. He or she should announce that the defendant stands on his motion, will present no proof, disclaims any benefit of any evidence introduced by his defendant, disavows any detriment, and should state that the evidence presented by the co-defendant will not be binding upon him, and he should participate no further in the trial until after the conclusion of all the proof.

Id. at 453. The Court went on to state that, by failing to close his case and by participating in the trial, the defendant in that case waived the error in the action of the court on his motion for an acquittal. *Id.*

The Tennessee Supreme Court discussed its previous holding in *Mathis* and recognized the "difficult choice" facing a defendant if the defendant moves for a judgment of acquittal at the close of the State's proof and the trial court does not grant that motion. *Finch v. State*, 226 S.W.3d 307, 316-17 (Tenn. 2007). The Court stated, "While we are sensitive to the conundrum facing defense lawyers under its holding, we need not revisit our decision in *Mathis* in this case unless we determine that the proof was insufficient to support the Petitioner's convictions as of the close of the State's case-in-chief." *Id.*

In the case under submission, the Defendant did not stand on his motion for judgment of acquittal but rather continued participating in the trial. He, in fact, testified on his own behalf. As noted by the Tennessee Supreme Court, *Mathis* has not been overruled, and it is binding precedent on this Court. Therefore, the Defendant waived his right to appeal from the trial

court's refusal to grant his motion for judgment of acquittal. *Mathis*, 590 S.W.2d at 453. Further, because the Defendant elected to introduce evidence, "'the appellate review encompasses the evidence in toto.'" *Finch*, 226 S.W.3d at 316 (quoting *State v. Rutan*, 194 Conn. 438, 479 A.2d 1209, 1211 (Conn. 1984)).

B. Sufficiency of the Evidence

The Defendant next contends that the evidence is insufficient to sustain his conviction for facilitation to commit first degree felony murder. The Defendant asserts that the evidence did not show that he "implicitly or expressly planned to facilitate felony-murder." He says that he walked in on a fight that he did not know was going to happen and merely tried to get the victim away from Newsome when he found the victim choking Newsome.

When an accused challenges the sufficiency of the evidence, this Court's standard of review is whether, after considering the evidence in the light most favorable to the State, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see* Tenn. R. App. P. 13(e), *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.w.3d 389, 392-93 (Tenn. Crim. App. 1999).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999); *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956). "Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *Liakas*, 286 S.W.2d at 859. "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978); *State v. Grace*, 493 S.W.2d 474, 479 (Tenn. 1973). The Tennessee Supreme Court stated the rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1996) (citing *Carroll v. State*, 370 S.W.2d 523 (Tenn. 1963)). This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. *Goodwin*, 143 S.W.3d at 775 (citing *State v. Smith*, 24 S.W.3d 274, 279

(Tenn. 2000)). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000). Importantly, the credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the evidence are matters entrusted exclusively to the jury as the trier of fact. *Bland*, 958 S.W.2d at 659.

The Defendant was convicted of facilitation to commit first degree felony murder. Facilitation of felony murder requires proof that:

> (1) One of the felonies listed in Tennessee Code Annotated section 39-13-202(a)(2) or (3) was committed;
>
> (2) The victim was killed during the commission of that offense;
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> (3) The defendant knew that another person intended to commit the underlying felony, but he or she did not have the intent to promote or assist the commission of the offense or to benefit in the proceeds or results of the offense; and
>
> (4) The defendant knowingly furnished substantial assistance to that person in the commission of the underlying felony.

See State v. Margie Jeanette Farley, No. M2003-02826-CCA-R3-CD, 2005 WL 366890, at *9 (Tenn. Crim. App., at Nashville, Feb. 16, 2005) (citations omitted), *perm. app. denied* (Tenn. June 27, 2005).

In this case, the Defendant was convicted of especially aggravated robbery, which was the underlying felony supporting the facilitation of felony murder conviction. This is an offense listed in Tennessee Code Annotated section 39-13-202(a)(2). The Defendant does not argue that the evidence is insufficient to support his especially aggravated robbery conviction; rather, he asserts that the evidence did not show that he "implicitly or expressly planned to facilitate felony-murder." Whether the Defendant "implicitly or expressly planned to facilitate felony-murder" is not an element of this offense. *See Farley*, 2005 WL 366890. By convicting the Defendant of facilitation of felony murder, the jury concluded that the Defendant knew that Newsome intended to commit this robbery but did not intend to assist in the commission of the offense or in the proceeds. The Defendant testified that Newsome approached him about taking some morphine pills from the victim, and the Defendant saw Newsome approach the house with a bat. Further, the jury found that the Defendant provided substantial assistance, by being a "lookout" and then by assisting Newsome in the altercation. There is sufficient evidence to support the jury's findings. The Defendant is not entitled to relief on this issue.

C. Motion for Mistrial

The Defendant next contends that the trial court should have declared a mistrial because one of the jurors was biased.[2] The Defendant asserts that a juror indicated that Terry McGhee, who was a witness for the State, was her nephew, and she believed him to be honest.

After the jury in this case was sworn, the trial court informed the parties that a juror had indicated that she thought that Terry McGhee might be her nephew. The Defendant moved for a mistrial. The trial court denied the motion. It first noted that neither party asked during voir dire if any juror knew or was related to any of the witnesses. The court then found that, because there were alternate jurors, the question was whether this juror should remain on the jury and not whether a mistrial should be granted.

The juror was then questioned by the parties. She testified that McGhee was her husband's nephew, and she had only seen him at a few family functions. She said she believed him to be an honest person, but she said that she would be able to follow the trial court's guidelines about determining whether a witness was telling the truth. She also indicated that she would not be offended if defense counsel aggressively questioned McGhee, as that was part of his job.

The prosecutor told the court of the proposed substance of McGhee's testimony. At trial, McGhee testified he lived next door to the victim and that on October 24, 2003, he heard a knock at his door. It took him a few minutes to answer the door, but when he did he saw Bowen waving to him to come towards Neff's house. McGhee recalled that another neighbor, Morris, was also at Neff's house, and they were standing next to Neff's body. McGhee saw blood on Neff's head and on the sidewalk where he was lying. Morris had her phone, and McGhee used it to call 9-1-1, and law enforcement and an ambulance arrived shortly thereafter. On cross-examination, McGhee agreed that there were frequently different cars at the victim's house. He said he knew that the victim had previously been in a serious car accident, but he did not know whether he had multiple prescription pills as a result. McGhee testified he did not know the Defendant.

The decision on whether to grant a mistrial lies within the sound discretion of the trial court. *State v. Smith*, 871 S.W.2d 667, 672 (Tenn. 1994). We will not interfere with the trial court's decision to refuse to grant a mistrial "absent clear abuse appearing on the face of the record." *State v. Burns*, 979 S.W.2d 276, 293 (Tenn. 1998). In determining whether to grant a mistrial, the trial court would determine "[i]f it appears that some matter has occurred which would prevent an impartial verdict from being reached . . . ." *Arnold v. State*, 563 S.W.2d 792, 794 (Tenn. Crim. App. 1977). Additionally, this Court has stated that a mistrial should be declared if there will be a miscarriage of justice if it were not." *See Burns*, 979 S.W.2d at 293; *State v. Allen*, 976 S.W.2d 661, 668 (Tenn. Crim. App. 1997).

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[2] The Defendant also contends that the trial court should have granted a motion for a mistrial based upon prosecutorial misconduct. He also later asserts that the State's closing argument constituted prosecutorial misconduct. We will address those two contentions together in a later section.

Article I, section 9 of the Tennessee Constitution guarantees a criminal defendant the right to trial "by an impartial jury." In fact, every accused is guaranteed "a trial by a jury free of . . . disqualification on account of some bias or partiality toward one side or the other of the litigation." *State v. Akins*, 867 S.W.2d 350, 354 (Tenn. Crim. App. 1993) (citing *Toombs v. State*, 197 Tenn. 229, 270 S.W.2d 649, 650 (1954)). In Tennessee, challenges to juror qualifications generally fall into two categories – propter defectum, "on account of defect," or propter affectum "for or on account of some affection or prejudice." *Carruthers v. State*, 145 S.W.3d 85, 94 (Tenn. Crim. App. 2003); *Akins*, 867 S.W.2d at 355. General disqualifications such as alienage, family relationship, or statutory mandate are classified as propter defectum and must be challenged before the return of a jury verdict. *Adkins*, 867 S.W.2d at 355. An objection based upon bias, prejudice, or partiality is classified as propter affectum and may be made after the jury verdict is returned. *Id.* "Where a juror is not legally disqualified or there is no inherent prejudice, the burden is on the defendant to show that a juror is in some way biased or prejudiced." *State v. Caughron*, 855 S.W.2d 526, 539 (Tenn. 1993) (citing *Bowman v. State*, 598 S.W.2d 809, 812 (Tenn. Crim. App. 1980)). The defendant bears the burden of proving a prima facie case of bias or partiality. *Id.* (citing *Taylor*, 669 S.W.2d at 700).

We conclude that the Defendant did not prove a prima facie case that the juror was biased. While the juror testified that she believed her husband's nephew to be honest, she also testified that she did not know him well, did not see him often, had not seen him in years, and would follow the trial court's guidelines about the truthfulness of testimony. Further, McGhee's testimony was not central to the issue of the Defendant's guilt in that it related only to finding the victim injured and calling 9-1-1 on his behalf. Under these circumstances, we conclude that the trial court properly denied the motion for mistrial, and the Defendant is not entitled to relief on this issue.

D. Evidentiary Issues

The Defendant next asserts that the trial court erred when it made several evidentiary rulings. He asserts that the trial court erred when it: (1) allowed McGhee's testimony; (2) excluded witness testimony about the Defendant's actions after this incident; (3) excluded the testimony of Daniel Rogers; (4) excluded a letter written by Newsome to the Defendant; and (5) allowed portions of the Defendant's confession.

The admissibility, relevancy, and competency of evidence are matters entrusted to the sound discretion of the trial court. With that principle in mind, we review the trial court's evidentiary rulings for an abuse of discretion. *See State v. DuBose*, 953 S.W.2d 649, 652 (Tenn. 1997); *State v. Gray*, 960 S.W.2d 598, 606 (Tenn. Crim. App. 1997).

1. McGhee's Testimony

The Defendant asserts that the trial court erred when it allowed testimony from Terry McGhee. He contends that the State violated Tennessee Code Annotated section 40-17-106 by not listing McGhee's name on the indictment as a potential state witness. The State counters first that the Defendant failed to object to McGhee's testifying at trial and second that the

Defendant has failed to show "prejudice, bad faith, or undue advantage" as required by case law interpreting the statute.

The record reflects that the Defendant failed to contemporaneously object to McGhee's testimony at trial, thereby the Defendant "failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." Tenn. R. App. P. 36(a). We will, however, address this issue on its merits.

Pursuant to Tennessee Code Annotated section 40-17-106, the district attorney general is to list upon the indictment the names of witnesses expected to be called at trial. This duty is directory only. *State v. Baker*, 751 S.W.2d 154, 164 (Tenn. Crim. App. 1987); *State v. Underwood*, 669 S.W.2d 700, 703 (Tenn. Crim. App. 1984). Accordingly, failure to include a name on the list does not necessarily disqualify that witness from testifying. *State v. Street*, 768 S.W.2d 703, 711 (Tenn. Crim. App. 1988). The statute is intended to prevent surprise to a defendant and to ensure that the defendant will not be handicapped in defense preparation. *State v. Morris*, 750 S.W.2d 746, 749 (Tenn. Crim. App. 1987). A defendant will be entitled to relief for nondisclosure if he or she can demonstrate prejudice, bad faith or undue advantage. *State v. Harris*, 839 S.W.2d 54, 69 (Tenn. 1992); *State v. Kendricks*, 947 S.W.2d 875, 883 (Tenn. Crim. App. 1996). The decision to allow a witness to testify is discretionary with the trial court. *Kendricks*, 947 S.W.2d 883.

In the case under submission, the Defendant cursorily asserts that he was "clearly prejudiced" by the trial court's decision to allow McGhee to testify but offers no explanation of how. The Defendant was aware of the 9-1-1 call, the contents of the call, and the other witnesses who testified about finding the victim injured on his front porch. The Defendant has not demonstrated prejudice, bad faith, or undue advantage, and we cannot conclude that the trial court abused its discretion by allowing McGhee to testify.

2. Testimony Regarding Defendant's Actions After Killing

The Defendant next asserts that the trial court erred when it refused to allow several witnesses to testify about the Defendant's behavior after the killing. These witnesses, Franklin Wright, Steve Forrester, Frank Standridge, and Grace Rogers, planned to testify that the Defendant was in church with his grandmother on the Sunday after this incident, where they observed him visibly upset and crying. One witness would have testified that he saw the Defendant "visibly upset and disturbed," he was weeping, and acted like a child might act. Another witness planned to testify that the Defendant told him that the Defendant could not say what was bothering him but that he was "sorry." Also, the witness would have said that he was surprised to see the Defendant there because the Defendant came to church only "sporadically." Another witness from the church planned to testify the Defendant was weeping uncontrollably, which was unusual.

The State objected to this testimony on grounds of relevance, and the trial court sustained that objection. On appeal, the Defendant argues that, because the State was allowed to offer as evidence a confession, which occurred several days after this killing, he should have been

allowed to offer testimony about his state of mind after this killing. He asserts that the trial court's ruling prevented him from attacking the State's proof regarding mental culpability.

The Tennessee Rules of Evidence make admissible "all relevant evidence . . . except as provided by the Constitution of the United States, the Constitution of Tennessee, these Rules, or other rules or laws of general application in the courts of Tennessee. Evidence which is not relevant is not admissible." Tenn. R. Evid. 402. "Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401.

In the case under submission, the Defendant was on trial for first degree premeditated murder, first degree felony murder, and especially aggravated robbery. One of the factors relevant to premeditation is calmness immediately after the killing. *See, e.g., State v. Millsaps*, 30 S.W.3d 364, 369 (Tenn. Crim. App. 2000). Therefore, the only arguable admissibility of this evidence, an argument not made by defense counsel, would be to show lack of premeditation, in that the Defendant had remorse after this killing. This killing occurred on Friday, and the excluded testimony concerned the Defendant's actions two days later. This time duration does not, in our view, constitute "calmness" or "remorse" immediately after the killing.

In *State v. Bowling*, 649 S.W.2d 281 (Tenn. Crim. App. 1983), this Court addressed a similar, but still very distinct, issue. In that case, the Defendant was being tried for child abuse. *Id.* at 284. The State sought to introduce photographs of the child's mother, which depicted her with bruises. *Id.* The parties agreed that the fight that led to those bruises occurred between the child's mother and the Defendant after the Defendant's alleged abuse of the child. *Id.* The trial court admitted the photographs, finding that the pictures showed, in part, the Defendant's "state of mind." We held, "Defendant's state of mind a day or two after the last acts of abuse against the child . . . certainly was not relevant to the injuries sustained by [the child]." *Id.*

Importantly, we note that *Bowling* was decided within the realm of 404(b) character evidence. We, however, conclude, as did the trial court, that the Defendant's actions days after a crime are not relevant to proving his state of mind at the time of the crime. The trial court did not abuse its discretion when it refused to allow these witnesses to testify. Accordingly, we conclude that the Defendant is not entitled to relief on this issue.

3. Daniel Rogers' Testimony

The Defendant next asserts that the trial court erred when it refused to allow Daniel Rogers to testify. The Defendant said in his statements to police that he feared Newsome and Newsome's family. The Defendant sought to introduce the testimony of his brother, Daniel Rogers, to establish that Daniel had been "ambushed" by Newsome's father in retaliation for the Defendant's testifying at Newsome's preliminary hearing. Daniel Rogers would have testified that Newsome's father said "I'll show you, I'll teach you to go down there and testify against my son." Daniel would also have testified that Newsome's father was later arrested and convicted of assault for his attack of Daniel. The State objected to this evidence, stating that Newsome's

threats were hearsay. The trial court agreed. The Defendant contends that this prevented him from establishing that "he was acting under duress during the crime."

Our criminal code provides that the general defense of duress is a defense to prosecution:

> [W]here the person or a third person is threatened with harm which is present, imminent, impending and of such a nature to induce a well-grounded apprehension of death or serious bodily injury if the [criminal] act [being prosecuted] is not done. The threatened harm must be continuous throughout the time the [criminal] act is being committed, and must be one from which the person cannot withdraw in safety. Further, the desirability and urgency of avoiding the harm must clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the [criminal] conduct.

T.C.A. § 39-11-504(a). The Sentencing Commission Comments to section 504 advise that "[t]his rare defense is present when a defendant commits an offense because another person threatens death or serious bodily injury if the offense is not committed." The comments further point out that, in order for the defense of duress to be available, "there must be no reasonable opportunity to escape the compulsion without committing an offense." T.C.A. § 39-11-504 Sentencing Comm'n Cmts.; *see State v. Robinson*, 622 S.W.2d 62, 73 (Tenn. Crim. App. 1980).

We fail to see how threats and an assault made toward the Defendant's brother by the Defendant's co-defendant's father after this killing occurred are relevant to whether the Defendant acted under duress at the time of this killing. First, Newsome's father's actions bear no relevance to Newsome's actions. Second, these alleged incidents occurred after this crime and bear no relevance to what took place at the time of the crime. Third, the Defendant was not present during these actions. This testimony bears no relevance to any issue to be decided by the jury. Furthermore, the trial court correctly determined this evidence was hearsay. Accordingly, the Defendant is not entitled to relief on this issue.

4. Newsome's Letter to the Defendant

The Defendant next contends that the trial court erred when it refused to admit a letter written by Newsome to the Defendant. The Defendant first contends that Newsome clearly accepted responsibility for this crime in the letter. As such, this letter is evidence of another's responsibility. The State counters that the statement is inadmissible hearsay, and it is unreliable in that it contradicts the numerous statements made by Newsome to the police. Further, the State asserts that this letter was not a statement against Newsome's penal interest because he had already pled guilty when he allegedly wrote the letter.

> A part of the letter, which was admitted for identification only, reads as follows:
> I shouldn't leave until next week. I hope you get out before me. The way I see it [b]oth of us don't have to go down for this. Look, I didn't have anywhere in my plea that I was going to testify against you. The DA did pull some slick shit and

> told your attorney I was. He can call me as a witness. All he has to do is subp[o]ena me. If that cock sucker does, I will testify to whatever will help you. I do not need to know so get up here. As of right now I would say I ple[]d guilty of 2nd and esp[ecially] agg[ravated[[r]obbery because I done it. All I know is I lied on my statement and you cam in the guy was on top of me you knocked him off. Then I got up killed him & [r]obbed him. Holla at me tomorrow in person. I won't take you down with me. I put that on everything I love! I'll see you in the morning. Love always Bro
>
> /signed Paul

As commonly recognized, an accused is entitled to present evidence implicating others in the crime. *See State v. Carruthers*, 35 S.W.3d 516, 575 (Tenn. 2000) (appendix) (citations omitted). Evidence in support of this third party defense, however, must conform to the general rules governing the admissibility of evidence. *Id.* (citation omitted). The evidence must be the type that would be admissible against the third party if he or she were on trial, and the proof must be limited to facts inconsistent with the appellant's guilt. *Id*; *State v. Kilburn*, 782 S.W.2d 199, 204-05 (Tenn. Crim. App. 1989). Accordingly, hearsay evidence implicating another individual would not be admissible. *Id.*

The issue becomes, then, whether this evidence constitutes hearsay, and, if so, whether there is an applicable hearsay exception. The Defendant asserts that this evidence, while hearsay, would not be hearsay at Newsome's trial because it would be an admission by Newsome. Further, even if hearsay, the evidence would be admissible hearsay at Newsome's trial as a statement against penal interest. The Defendant asserts that, because the evidence is of "the type that would be admissible against [Newsome] if he . . . were on trial . . .", it is admissible at the Defendant's trial. We agree.

In *Kilburn*, the defendant was on trial for murder. He sought to introduce the sworn statements of two other people upon which he was attempting to cast the blame for the murder. *Id.* at 204. We held:

> Considering the defendant's third party defense these two statements appear to be most relevant. The statements expand on the proof allowed on this issue and include additional information which bolstered the defense theory. Both statements were sworn, given voluntarily, and made after compliance with the parties' *Miranda* rights. Had either or both of these individuals been on trial for this murder these statements would have been admissible. *See State v. McAlister*, 751 S.W.2d 436 (Tenn. Crim. App. 1987). It was error to exclude this evidence.

Id. at 204-05.

As the Defendant contends, the issue is whether this evidence would have been admissible at Newsome's trial. This letter, if proven to be written by Newsome, would be

admissible at Newsome's trial as an admission by Newsome. Therefore, it was error not to admit this evidence at the Defendant's trial. We conclude, however, that this error was harmless. *See State v. Edwardo Rodriguez*, – S.W.3d –, No. M2005-02466-SC-R11-CD, 2008 WL 1817361, at *11 (Tenn. Apr. 24, 2008) (holding that when conducting a harmless error analysis pursuant to Tenn. R. App. P. 36(b) the question before the court is whether the admission of the evidence more probably than not affected the verdict or resulted in prejudice to the judicial process). This evidence was largely cumulative. In the letter, Newsome said that he would testify at trial that he had pled guilty to second degree murder and especially aggravated robbery because he "done it." The testimony at the Defendant's trial indicated that Newsome pled guilty to second degree murder and especially aggravated robbery with regard to this killing. Newsome, therefore, took responsibility for this crime. The jury accredited the evidence of Newsome's responsibility by convicting the Defendant of only facilitation of first degree murder and especially aggravated robbery. Further, the evidence presented overwhelming supported the Defendant's convictions. We, therefore, cannot conclude that the admission of the evidence more probably than not affected the verdict or resulted in prejudice to the judicial process, and the Defendant is not entitled to relief on this issue.

5. Portions of Defendant's Confession

The Defendant asserts that, pursuant to Tennessee Rule of Evidence 403, the trial court should not have allowed portions of his videotaped statement to be admitted into evidence. He specifically complains about the statements such as "it's a crime to lie to a police officer" and that the Defendant had been to jail in the past. The Defendant also contends that, while a copy of the videotape was provided to him, the transcripts of the interviews were not provided to him until trial. He says the "impact [of the transcript] was that the [S]tate was able to bang the drum louder, and hence draw closer attention to the statements."

The record indicates that the Defendant did not object pretrial to the admission of his confessions. He never moved to suppress them, and he did not request that portions of those tapes be redacted. At trial, after the videotape of the first confession began to be played for the jury, the Defendant objected, saying that he did not know that the entire interview would be played for the jury. The Defendant objected to particular statements, and the trial court offered curative instructions, stating that curative instructions were the best course of actions at the "late stage" at which the Defendant objected. The Defendant seemed to indicate that, had he had a transcribed copy of the videotapes, he would have been better able to request that portions be redacted.

It has long been established in Tennessee that a party cannot take advantage of errors which he himself committed, invited, or induced the trial court to commit, or which were natural consequences of his own neglect or misconduct. Tenn. R. App. P. 36(a). Moreover, Tennessee Rule of Criminal Procedure 12(b) provides that any defense, objection, or request which is capable of determination without trial may be raised before trial. *State v. Cameron*, 909 S.W.2d 836, 853 (Tenn. Crim. App. 1995). Several matters must be raised prior to trial, including motions to sever and to suppress evidence. *Id.* Failure to present these motions before trial

amounts to waiver of the issue. *Id.* (citing *State v. Eldridge*, 749 S.W.2d 756, 757 (Tenn. Crim. App. 1988)).

There is no rule of law or procedure that requires the State to transcribe a videotape confession of a defendant. Further, there is no rule or law that requires the State to provide a transcript to the defendant. The defendant is entitled to the statement, and the State in this case so provided it. The Defendant did not move to suppress that statement, and he has waived our review of this issue.

E. Prosecutorial Misconduct

The Defendant next contends that the State's closing argument constituted prosecutorial misconduct. We review this issue under the abuse of discretion standard. *State v. Hall*, 976 S.W.2d 121, 127 (Tenn. 1998). "Courts have recognized that closing argument is a valuable privilege afforded to the State and the defense and have afforded wide latitude to counsel in arguing their cases to the jury." *State v. Cleveland*, 959 S.W.2d 548, 551 (Tenn. 1997) (citing *State v. Bigbee*, 885 S.W.2d 797, 809 (Tenn. 1994)). We have recognized five general areas of prosecutorial misconduct: (1) intentionally misstating the evidence or misleading of the jury on the inferences it can draw; (2) expressing personal beliefs or opinions; (3) inflaming or attempting to inflame the passions or prejudices of the jury; (4) adding outside issues to the guilt or innocence issue; and (5) arguing or referring to outside facts. *State v. Goltz*, 111 S.W.3d 1, 5-6 (Tenn. Crim. App. 2003).

Tennesseee Rule of Criminal Procedure 29.1(b) allows a closing argument to address any evidence introduced at trial. In addition to addressing the evidence, parties may also argue "reasonable inferences." *State v. Chico McCracken*, No. W2001-03176-CCA-R3-CD, 2003 WL 1618082, at *8 (Tenn. Crim. App., at Jackson, Mar. 24, 2003), *perm. app. denied* (Tenn. Sept. 2, 2003). When there is improper argument, the court must test whether the inflammatory statement negatively impacted the Defendant. To measure this impact, five factors should be considered: "(1) the facts and circumstances of the case; (2) any curative measures undertaken by the court and the prosecutor; (3) the intent of the prosecution; (4) the cumulative effect of the improper conduct and any other errors in the record; and (5) the relative strength or weakness of the case." *Goltz*, 111 S.W.3d at 5-6. Curative measures by the court, such as proper jury instructions, will likely render the misconduct harmless. *McCracken*, 2003 WL 1618082, at *8 (citing *Zafiro v. United States*, 506 U.S. 534, 540-41 (1993), for the proposition that, "In the absence of compelling prejudice, proper instructions will generally be sufficient 'to cure any risk of prejudice' when one defendant's counsel argues that the codefendant is the guilty party.").

The Defendant complains about three comments by the prosecutor. The first of these comments was, "Now, [defense counsel] will probably get up here in a moment and say [the Defendant] told [him] that Paul Newsome –". The Defendant objected, contending that this was improper argument because the State could not properly counter anything that defense counsel may or may not say in his closing argument. The trial court overruled the objection.

On appeal, the Defendant asserts that the State improperly commented on communications between the Defendant and defense counsel. We fail to see how the State acted improperly. The Defendant testified at trial that Newsome was responsible for the attack, making it clear that the Defendant's defense was that Newsome, and not the Defendant, perpetrated this crime. The trial court did not abuse its discretion when it determined that this was proper argument.

The Defendant next asserts that the State improperly commented on facts not introduced into evidence. The Defendant cites to pages in the record where he objected during the closing argument, arguing to the court that the prosecutor said that the Defendant "said 'bat' twice." It appears that the Defendant was objecting to the following comment made much earlier by the prosecution:

> But the moment of truth came today, right there at the witness stand, and what did he say twice, that he's never once said before? "I only hit him twice with the broom, once in the neck and once in the arm." But what did he say from the witness stand today, when [defense counsel] had him down demonstrating what was going on? He said, "Well, I swung the bat once and then I swung the bat again." Then he says, "Whoops, the broom, I mean, the broom." The truth came out. He swung the bat, because we know [the victim] would [n]ever let Newsome in.

Defense counsel asked the court to go back and review the record and see if the Defendant had, in fact, said "bat" twice. If not, he said he would move for a mistrial. The trial court instructed the jury, "[T]hese arguments are not evidence, you will remember the evidence from your own recollection."

At trial, the Defendant responded to questions from defense counsel stating, "I swung the bat again. I mean, the bat. The broom again. And I hit him in the neck and he turned around." The Defendant clearly misspoke during his testimony. However, the State may appropriately point to the Defendant's mistake. Furthermore, the trial court instructed the jury that the State's comments were not evidence and that the jury was to recall the evidence independently. This cured any risk of prejudice.

Finally, the Defendant asserts that the State improperly took personal offense to closing argument of defense counsel. The State's attorney stated:

> I don't understand, and [defense counsel], consistencies through inconsistencies, what does that mean? He said some things the same through all the lies, some things remain the same, and fear and the remorse. Good for him. Not a defense, don't even consider it. That's not your job, it's not part of it, and it's insulting, it really is, to your intelligence.

Defense counsel objected, arguing that the prosecutor's making statements to the jury that defense counsel's arguments "insult[] her intelligence" was prosecutorial misconduct because it

constituted commenting on the veracity of the evidence and not the evidence. The trial court overruled the objection.

We conclude that the trial court did not abuse its discretion when it overruled the Defendant's objection. It would, perhaps, be a better course of action for the prosecutor to not argue that the jury should be insulted by arguments of defense counsel. We again note, however, the wide latitude afforded counsel when making closing arguments. Further, even if this argument were improper, we cannot conclude that it negatively impacted the Defendant. The prosecutor did not appear to have bad intent, there were few other errors in the record, and the case against the Defendant was very strong. *See Goltz*, 111 S.W.3d at 5-6. Accordingly, the Defendant is not entitled to relief on this issue.

F. Sentencing

Finally, the Defendant contends that the trial court erred when it applied two enhancement factors when sentencing him. The Defendant was convicted of two Class A felonies: facilitation to commit first degree felony murder and especially aggravated robbery. As a Range I offender, his applicable sentencing range was fifteen to twenty-five years on each offense. T.C.A. § 40-35-112(a)(1). The trial court applied two enhancement factors to each of the Defendant's sentences: (1) that the defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range; and (2) that the defendant treated, or allowed a victim to be treated, with exceptional cruelty during the commission of the offense. *See* T.C.A. § 40-35-114(1), (5) (2003). Additionally, to enhance the Defendant's especially aggravated robbery conviction, the trial court applied the following enhancement factor, that the personal injuries inflicted upon, or the amount of damage to property sustained by or taken from, the victim was particularly great. *See* T.C.A. § 40-35-114 (6). Finding that there were no applicable mitigating factors, the trial court sentenced the Defendant to twenty-three years for the facilitation to commit first degree murder conviction and to twenty-four years for the especially aggravated robbery conviction. The court ordered these sentences to be served concurrently.

When a defendant challenges the length and manner of service of a sentence, it is the duty of this court to conduct a de novo review of the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d) (2003).[3] This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *State v. Ross*, 49 S.W.3d 833, 847 (Tenn. 2001); *State v. Pettus*, 986 S.W.2d 540, 543 (Tenn. 1999); *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court that are predicated upon uncontroverted facts. *State v. Dean*, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); *State v. Butler*, 900 S.W.2d 305, 311 (Tenn. Crim. App.

[3]We note that on June 7, 2005, the General Assembly amended Tennessee Code Annotated sections 40-35-102(6), -114, -210, -401. *See* 2005 Tenn. Pub. Acts ch. 353, §§ 1, 5, 6, 8. However, the amended code sections are inapplicable to the Defendant's appeal.

1994); *State v. Smith*, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994). If our review reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and made findings of fact that are adequately supported by the record, then we may not modify the sentence, even if we would have preferred a different result. *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). We will uphold the sentence imposed by the trial court if (1) the sentence complies with the purposes and principles of the Sentencing Act; and (2) the trial court's findings are adequately supported by the record. *See State v. Arnett*, 49 S.W.3d 250, 257 (Tenn. 2001). The burden of showing that a sentence is improper is upon the appealing party. *See* T.C.A. § 40-35-401 Sentencing Comm'n Cmts.; *Arnett*, 49 S.W.3d at 257.

In conducting a de novo review of a sentence, we must consider: (a) any evidence received at the trial and/or sentencing hearing; (b) the presentence report; (c) the principles of sentencing; (d) the arguments of counsel relative to sentencing alternatives; (e) the nature and characteristics of the offense; (f) any mitigating or enhancement factors; (g) any statements made by the defendant on his or her own behalf; and (h) the defendant's potential or lack of potential for rehabilitation or treatment. *See* T.C.A. § 40-35-210 (1997 & Supp. 2002); *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001).[4] The party challenging a sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. T.C.A. § 40-35-401 (2006), Sentencing Comm'n Cmts. To facilitate appellate review, the trial court is required to place on the record its reasons for imposing the specific sentence, including the identification of the mitigating and enhancement factors found, the specific facts supporting each enhancement factor found, and the method by which the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. *See State v. Samuels*, 44 S.W.3d 489, 492 (Tenn. 2001).

The Defendant does not contest the application of the enhancement factor involving his prior criminal history. Rather, he asserts that the trial court improperly applied the other two enhancement factors. The State agrees on appeal that the trial court improperly applied enhancement factor (6) that the personal injuries inflicted upon, or the amount of damage to property sustained by or taken from, the victim was particularly great. *See* T.C.A. § 40-35-114 (6). As the State notes, the Tennessee Supreme Court has held that proof of serious bodily injury will always constitute proof of particularly great injury. *See State v. Jones*, 883 S.W.2d 597, 602 (Tenn. 1994). Accordingly, the trial court misapplied this enhancement factor.

Because the trial court misapplied an enhancement factor, our review of the Defendant's sentence is de novo with no presumption of correctness. As such, while not raised by the

[4]Effective June 7, 2005, Tennessee Code Annotated sections 40-35-114 and 40-35-210 were rewritten in their entirety. *See* Tenn. Pub. Acts, ch 353, §§ 5,6. These sections were replaced with language rendering the enhancement factors advisory only and abandoning a statutory minimum sentence. *See* T.C.A. §§ 40-35-114 (2005) ("[t]he court shall consider, but is not bound by, the following advisory factors in determining whether to enhance a defendant's sentence"); -35-210(c) ("In imposing a specific sentence within the range of punishment, the court shall consider, but is not bound by, the following advisory sentencing guidelines.").

Defendant at sentencing or on appeal, we recognize the impact of *Blakely v. Washington*, 542 U.S. 296 (2004), on the Defendant's sentence, and we will address the effect of *Blakely* in our analysis of the Defendant's sentences.[5] *State v. Chester Wayne Walters*, No. M2003-03019-CCA-R3-CD, 2004 WL 2726034, at *25 (Tenn. Crim. App., at Nashville, Nov. 30, 2004), *perm. app. denied* (Tenn. Mar. 21, 2005).

The Defendant was convicted of facilitation to commit first degree felony murder and especially aggravated robbery, both class A felonies. The appropriate sentence range for a Range I offender convicted of a Class A felony is fifteen to twenty-five years. T.C.A.§ 40-35-112(a)(2) (2003). Prior to the 2005 sentencing amendment, the presumptive sentence for a class A felony was the midpoint within the range absent enhancing or mitigating factors. T.C.A. § 40-35-210(c) (2003). The presumptive sentence is then increased for applicable enhancing factors and decreased for applicable mitigating factors. *Id*. at (d), (e).

Pursuant to *Blakely v. Washington*, 542 U.S. 296 (2004), the trial court's application of the "exceptional cruelty" enhancement factor to the Defendant's sentence violated the Defendant's constitutional rights. *See Cunningham v. California*, – U.S. –, 127 S. Ct. 856 (2007); *Harvey Webster v. State*, No. M-2006-00886-CCA-R3-PC, 2007 WL 1836092 (Tenn. Crim. App., at Nashville, June 28, 2007), *perm. app. dismissed* (Tenn. Sept. 7, 2007); *State v. Mark A. Schiefelbein*, 230 S.W.3d 88 (Tenn. Crim. App. 2007).

Accordingly, we conclude that the only properly applied enhancement factor is that the Defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range. We afford this factor, as did the trial court, little weight. Because there was only one enhancement factor properly applied by the trial court, the Defendant's sentence must be modified, unless the error was harmless beyond a reasonable doubt. *See Walters*, 2004 WL 2726034, at *22. We conclude that the error was not harmless. Therefore, starting at the presumptive sentence of twenty years, we enhance each of the Defendant's sentences one year, based upon the applicable enhancement factor. Like the trial

[5]The offense for which the Defendant was convicted occurred on October 24, 2003. He was sentenced on March 13, 2006. Effective June 7, 2005, the Sentencing Act was amended in response to a United States Supreme Court case *Blakely v. Washington*. The amendment, among other things, removed the presumptive sentence language from the Act and mandated that the trial "court shall impose a sentence within the range of punishment . . . ." *See* Tenn. Code Ann. § 40-35-210(c) (Supp. 2005); *cf.* Tenn. Code Ann. § 40-35-210(c) (2003). In the "Complier's Notes" section to this amendment, it states:

> Acts 2005, ch. 353, § 18 provided that the act shall apply to sentencing for criminal offenses committed on or after June 7, 2005. Offenses committed prior to June 7, 2005, shall be governed by prior law, which shall apply in all respects. However, for defendants who are sentenced after June 7, 2005, for offenses committed on or after July 1, 1982, the defendant may elect to be sentenced under the provisions of the act by executing a waiver of such defendant's ex post facto protections. Upon executing such a waiver, all provisions of the act shall apply to the defendant.

Tenn. Code Ann. § 40-35-210 (Supp. 2005) Complier's Notes. In the case under submission, the Defendant did not execute a waiver of his ex post facto provisions. Thus, the 2005 amendments to T.C.A. § 40-35-108 do not apply to the Defendant.

court, we find that no mitigating factors are applicable. The sentence for each conviction is therefore modified to twenty-one years. These sentences shall be served concurrently, for an effective sentence of twenty-one years.

III. Conclusion

Based on the foregoing reasoning and authorities, we affirm the judgments of the trial court in all respects save one. We conclude that the trial court improperly applied one enhancement factor to the Defendant's sentence for especially aggravated robbery. We, further conclude that *Blakely* prevents the application of the "exceptional cruelty" enhancement factor to the Defendant's sentences. We, therefore, reduce the Defendant's sentence for his two convictions from twenty-four and twenty-three years, respectively, to twenty-one years for each conviction. These sentences shall be served concurrently, for an effective twenty-one year sentence. Finally, we remand to the trial court for the entry of amended judgments reflecting the modified sentences of twenty-one years for each conviction, to be served concurrently.

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ROBERT W. WEDEMEYER, JUDGE